No. 2466.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

The Atchison, Topeka and Santa Fe Railway Company, a corporation,

Plaintiff in Error,

vs.

The United States of America,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

U. T. Clotfelter,
E. W. Camp,
Paul Burks,
Attorneys for Plaintiff in Error.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

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STATEMENT OF THE CASE.

At the request of the Interstate Commerce Commission [6] the United States brought this action to recover penalties for violations of the Act of Congress approved March 4, 1907 (34 Stats. at L., p. 1415), charging that plaintiff in error permitted certain employes to remain on duty for more than 16 hours while engaged in the movement of interstate trains [7].

Section 2 of this act reads as follows:

> "It shall be unlawful for any common carrier, its officers or agents subject to this act, to require or permit any employe subject to this act to be or remain on duty for a longer period than 16 consecutive hours," etc.

Section 3 enacts sanctions for the enforcement of the act, and contains the following proviso:

> "That the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officers or agents in charge of such employe at the time said employe left a terminal, and which could not have been foreseen:"

And this case turns entirely upon the proviso just quoted. The district attorney contends that in case of casualty, unavoidable accident, etc., the employes may proceed to the next point of their trip where a relief crew can be obtained and if on reaching such point the sixteen hours of service have expired, or if it is then evident that the term of service will have expired before the crew can bring the train to the next similar point, the carrier must then and there relieve the crew from further service. Plaintiff in error contends that in case of casualty, unavoidable accident, etc., occurring after a crew begins its run, the crew may complete that run no matter how many points they may pass where a relief crew might be put in charge.

The complaint states three causes of action, all with reference to a train which left Parker, Arizona, at 11:10 p. m., October 2, 1912, and ran to Los Angeles, California [7, 8, 9]. Plaintiff in error answered [10],

stating facts which bring it within the terms of the proviso as those terms are construed in this brief. Such facts are fully shown in the stipulation set out in the written stipulation upon which the cause was submitted, a jury having been waived [16, 17, 34].

This stipulation states that the plaintiff in error is a corporation engaged as a common carrier in interstate commerce by rail [17], operating a railway from Parker to Los Angeles, over which it ran a train carrying mail, interstate express, passengers and baggage [18, 19]; that this train starts from Phoenix, Arizona, changing engine and train crew at Parker; that the engine crew taking charge at Parker runs only to Barstow, California, but that the train crew, consisting of conductor and two brakemen, run through to Los Angeles (it will be noted that this case deals only with the conductor and brakemen); that the train crew consisted of the three employes named in the complaint [20]; that these employes were kept in service from 10:40 p. m., October 2 (30 minutes before time for leaving), to 8:25 p. m., October 3, at which time the train arrived at Los Angeles. The schedule [35], made a part of the stipulation, shows that the delay occurred between Bryman and Oro Grande, a delay of more than 6 hours, and that at all times after leaving Oro Grande at 3:23 p. m., October 3, until the arrival of the train at Los Angeles at 8:25 p. m., the employes had been on duty more than 16 hours; that between Bryman and Los Angeles the train passed several telegraph offices where operators were maintained, and were in communication with the train dispatcher charged with directing the movement of the

train [21]; that from Parker to Barstow the train was under the control of a chief dispatcher with office at Needles, and from Barstow to Los Angeles under the control of a chief dispatcher with office at San Bernardino, and that the train was moved on orders communicated by telephone and telegraph [21]; that the terminals for the conductor and brakemen on this train are Parker and Los Angeles; that the employes named in the complaint resided and had their homes in Los Angeles, from which point they customarily and immediately previous to the times mentioned in the complaint left for Parker in charge of the train which runs opposite to the train in question, which opposite train arrived at Parker about 1:15 a. m., October 2, whereupon the train crew was released until 10:40 p. m. that same night, during which time they were not required to perform any services; that Parker was their away-from-home terminal; that customarily the crew would reach Los Angeles about 10:15 a. m., and would perform no service from that time until 10:30 o'clock p. m. on the next day [22].

The train in question was delayed between Cadiz and Barstow 2 hours and 30 minutes on account of washouts. These delays could not have been foreseen when the train left Parker [23]. The train, if on time, would have left Barstow at 4:45 a. m., but actually left at 7:45, and with ample time to reach Los Angeles within less than 16 hours from Parker, but between said stations of Barstow and Oro Grande an axle under the tank of the engine broke, so that instead of reaching San Bernardino at 7:35 a. m., according to schedule (or at 10:35 a. m., on account of leaving Barstow late),

it actually arrived at San Bernardino at 5:30 p. m., and by the time the train reached Los Angeles the employes had been on duty 21 hours and 45 minutes, 6 hours and 10 minutes of which was due to the accident near Bryman [24].

San Bernardino is a point known and designated as a division terminal [24] and a place appointed and in customary use as a terminal from and to which crews of certain other passenger and freight trains operate their trains, but it was not a terminal for the passenger crew in charge of the train in question [25]. Plaintiff in error had in its employ at Los Angeles and also at San Bernardino passenger train crews subject to call, customarily employed in operating freight trains, but qualified to operate passenger trains between San Bernardino and Los Angeles, so that the employes in charge of the train in question could have been relieved at San Bernardino by placing the train in charge of other freight or passenger train crews, permitting the employes in question to deadhead from San Bernardino to Los Angeles, without performing any service between those points [25]; that before the train was ready to move after the accident near Bryman plaintiff in error and its officers in charge of said employes knew that the employes would have been on duty in excess of 16 hours by the time they reached San Bernardino, but no effort was made to relieve the employes before they had been on duty 16 hours, either before, or at, or after their arrival at San Bernardino [26].

That the word "terminal," as understood by railroad men throughout the United States, has reference to

trains and crews and means the beginning or the end of the employe's run, or the point at which, in the regular course of business, he would go on duty or at which, in the regular course of business, he would be relieved from duty. And it is not generally understood among railroad men that the word "terminal" relates to a relay or division point between the point at which the employe becomes a member of the crew and the point to which it was intended that he should accompany the train as part of the crew, although such intermediate relay or division point may have been the point of departure, the end of the run, or the terminal for other crews and other trains [26]. The failure of plaintiff in error to make any effort to relieve these employes before they reached Los Angeles was due to the understanding and belief of the officers and agents in charge of such employes that the delay to said train by reason of the casualties and unavoidable accidents mentioned justified the retention of said employes in service until they should have brought the train to the home terminal of the employes at Los Angeles, California [27]; that said railway is a well-managed railway, operated in accordance with the best known custom and usage prevailing among well-operated railways in the United States, and plaintiff in error considered it desirable, from the point of view both of said railway and of its employes in question, and in accordance with custom and usage prevailing upon its own and other well-operated railroads, that they should be permitted at the earliest opportunity to reach their home terminal at Los Angeles, where they might rest at their respective homes before being again required to

go on duty [28]. The 18th and 19th paragraphs of the stipulation [28 to 33] set forth certain rulings made by the Interstate Commerce Commission, to which more particular reference will be made in the argument in this brief.

The District Court made the stipulation its finding of facts, so that the only question in the case is whether or not these agreed facts support a judgment against the plaintiff in error.

SPECIFICATION OF ERRORS.

I.

The trial court erred in its conclusion of law [37] that the act of the plaintiff in error requiring and permitting said employes to continue on said run to the city of Los Angeles, California, was a violation of the provisions of the Hours of Service Act approved March 4, 1907, for the reason that the train of which said employes were in charge had, after starting on its run, been delayed by reason of a casualty and an unavoidable accident, and because the delay to which said train and said employes were subjected was the result of a cause not known to the plaintiff in error or to any of its officers or agents in charge of such employes at the time such employes left the terminal, and which could not have been foreseen [41]. See Assignment No. 2.

II.

The trial court erred in holding that defendant in error was entitled to a judgment against the plaintiff in error on each cause of action set forth in the complaint, together with costs, and in assessing a penalty

of $100 against the plaintiff in error on each of said causes of action, for the reason that, as fully appears from the agreed statement of facts upon which said cause was submitted to the court for its decision, the service of said employes was not in violation of said Act of Congress approved March 4, 1907, but that said act expressly authorized such service under the circumstances shown by such agreed statement of facts [41]. See Assignment No. 3.

III.

That the judgment made, rendered and entered in the above cause is contrary to the evidence contained in the agreed statement of facts upon which said cause was submitted to the court for decision, in this, that it affirmatively appears from said agreed statement of facts that the retention in service of the employes therein and in plaintiff's complaint mentioned was not in violation of the Act of Congress aforesaid, but was expressly authorized by said act under the circumstances shown and set forth in said agreed statement of facts [42]. See Assignment No. 4.

IV.

That said judgment is contrary to law because the delay to which the train mentioned in the complaint was subjected was the result of a cause not known to the plaintiff in error or any officer or agent in charge of said employes at the time when said employes left a terminal, and which could not have been foreseen, and because the retention in service during the time mentioned in said complaint of each of said employes

was the result of a casualty and of an unavoidable accident, by reason whereof said Act of Congress did not apply to the retention in service of said employes in excess of 16 hours, and because under and by virtue of the terms of said Act of Congress the retention in service during the time in said complaint and in said stipulation of facts mentioned of the employes therein named, under the circumstances shown by said agreed statement of facts, was expressly authorized, and the said Act of Congress did not apply and did not prohibit the said service of said employes [42-3]. See Assignment No. 5.

ARGUMENT.

The word "terminal" must be given its accepted and common meaning.

One of the admitted facts in this case [Tr. p. 26, par. 15] is that the word "terminal" has a commonly understood and accepted meaning throughout the United States among railroad men, and that it means the beginning or end of the employe's run, the point at which in the regular course of business he would go on duty as a member of a particular crew, or at which in the regular course of business he would be relieved from such duty.

Now, when Congress passes a statute dealing with railroads, and specifically dealing with the trainmen employed by the railroad, and imposes a duty of enforcing the act upon the Commission whose business it is to deal with railroads (see secs. 2 and 3 of the act)—in such a case we confidently assert that the

word in question is to be taken in the sense which custom and usage have thus given it.

Ex parte Hall, 18 Mass. (1 Pick.) 261;
Green v. Weller, 32 Miss. 650;
Quigley v. Gorham, 5 Cal. 418.

That such is the meaning of the word "terminal" where used in the act is further illustrated by the proceedings in Congress upon the discussion of this act and of the various bills out of which the present act grew.

Judge Trieber, in writing his opinion in United States v. Kansas City Southern, 189 Fed. 471, evidently accepted without any question this common use of the word. He says:

> "Is a delay in starting caused by reason of the fact that another train is late an excuse within the meaning of the proviso? That was a matter that was known to the carrier or its officers in charge of the employes at the time they left the terminal."

The meaning of the word "terminal" in the proviso is illustrated in a letter from representatives of railroad employes printed in the Congressional Record of the 59th Congress, Second Session (Vol. 41, part 1, p. 823). In the course of this letter the writers say:

"There are numerous things that might happen to a train that is only a few miles from its terminal and perhaps on the main line; that the train time might expire before relief could be gotten to them. Then, again, the crew might be but a few miles from their home terminal and the time expire, while in a few minutes perhaps they could reach their home terminal, where they could get their rest at their home where they should. We do not believe that you want to make

a law that will compel a crew to lay up 5 or 10 or 15 minutes from their home terminal just because the 16 hours were up, then when their rest was up run them into their home terminal and double them out again. Then the crew may have a hard run from their home terminal to their away-from-home terminal."

Senator Bacon, who was reading the letter, here explained:

"That means to the opposite terminal—from the home terminal to the opposite terminal."

He then read on:

"We therefore request you to do all in your power to so amend this bill in favor of the railroads of this country, so that unavoidable and unforeseen accidents be excepted, and in favor of the men that when an hour or two will get them to their home terminal be excepted; and, further, in favor of the men that when a few hours' rest at their away-from-home terminal will start them toward their home terminal, that the men be allowed to use their own judgment as to whether they are able to go or not."

The draft of the bill to which this letter referred made no provision like that added to section 3.

Senator Bacon said, in connection with this letter:

"All railroad men have their homes at or near their terminal, a place where their families are located, etc., where they are supposed to take their principal rest, and where lie-overs are permitted. Under the bill as it stands it is required that there should be ten hours' rest. As suggested in that communication, a railroad employe starting from his home, and making it may be a hard run to the other terminal, is very desirous to get back to his home and have his rest there; but he would be compelled under the bill to remain 10 hours at the other terminal and in that way have that much less rest at his home terminal."

At page 822, Senator Dolliver is quoted as follows:

"The bill contains a simple prohibition of that character, with an exception, namely, casualties occurring after the train has started upon its journey, sometimes requiring more than 16 hours on account of an accident to reach the terminals."

At page 768 is a quotation from the Commercial & Financial Chronicle of December 28, 1906, as follows:

"The bill in question, S. B. 5133, was introduced by Senator LaFollette and prohibits all tours of duty exceeding 16 hours, excepting in cases of accidents occurring after their trains have left the initial point."

Plaintiff in error stands on the construction early made by the Interstate Commerce Commission and accepted by Congress.

The act having been passed March 4, 1907, was made to take effect March 4, 1908. On March 16, 1908, the Interstate Commerce Commission issued an order explaining and interpreting the act. This ruling of March 16, 1908, was not incorporated in the regular publication of the Commission, known as its Conference Rulings Bulletin, until the issue of April 1, 1911, known as Conference Rulings Bulletin No. 5. Nevertheless it is the earliest ruling made by the Commission on this statute, and at page 93 of Conference Rulings Bulletin No. 5, in subdivision I of paragraph 287, the Commission said, with reference to section 3 and its proviso, that:

> "They served to waive the application of the law to employes on trains only until such employes, so delayed, reach a terminal or relay point."

Bulletin No. 5 then refers to Rule 88. Rule 88 was issued, with other rules, June 25, 1908, and is printed in Conference Rulings Bulletin No. 2 (see Pierce's Digest of Decisions, pp. 802-3). It will be noted that in this later ruling the Interstate Commerce Commission broadened its first holding, saying:

> "Any employe so delayed may therefore continue on duty to the terminal or end of that run. *The proviso quoted removes the application of the law to that trip.*"

This ruling was carried forward under the same number in Conference Rulings Bulletin No. 3, No. 4 and No. 5.

In the first report made to the Congress of the United States by the Interstate Commerce Commission after the taking effect of this law, being its 22nd Annual Report, at page 49, the Commission says that questions immediately arose as to the proper interpretation of that act with a view to explaining insofar as possible those features of the act which might be claimed to be ambiguous the Commission issued the following administrative ruling, and then quoted to the Congress of the United States as the interpretation of this act by the executive body charged with the enforcement thereof the sentence set out at pages 30, 31, 32 and 33 of the transcript, being paragraph 19 of the stipulation of facts.

We call especial attention to the fact that in this first report to the Congress the Commission said:

> "Employes unavoidably delayed by reason of causes that could not at the commencement of the trip have been foreseen may lawfully continue on duty to the terminal or end of that run."

In none of its later reports to the Congress of the United States, unless for the year 1913, which we have not examined, has the Commission suggested to Congress that any other interpretation might properly be put upon the language in question, or that the executive body charged with the enforcement of the act had in mind to apply any other construction.

It is pretty well understood that the reason why Congress allowed one year between the passage and the taking effect of this act was to permit the railways to make necessary rearrangements of their terminals, as the word is used in the act, in order that the run of the men might fit the 16-hour limit. In fact, nowhere from the inception of the act down has it ever been suggested that the word "terminal" had any other meaning in the law than the end of the appointed run.

What has been said with respect to the action of the Interstate Commerce Commission is merely an elaboration of the well reasoned opinion of Judge Sawtelle in United States v. Atchison, 212 Fed. 1000, which involved a case of delay to the train hereinbefore called the opposite train, running from Los Angeles to Parker. And these deliberate and reiterated statements of the Commission as to the sense in which it would enforce the act, and the acceptance by Congress in neither amending the act nor passing any statute declaratory of its meaning, amply justify the application of the rule that:

> "The construction of a statute by those charged with the execution of it is always entitled to the most respectful consideration and ought not to be overruled without potent reason."
>
> Heath v. Wallace, 138 U. S. 573, 34 L. Ed. 1063, and cases cited.

The judgment should be reversed, no matter what Congress meant by the word "terminal."

We have so far discussed this case as if it turned on the meaning of the word "terminal"; but it is doubtful if that word has any significance whatever in this case. The word "terminal," or the phrase "left a terminal," cannot be carried back to modify the first part of the sentence. The statement that "the act shall not apply in any case of casualty or unavoidable accident or act of God" stands without any modification. The phrase "left a terminal" applies only to that part of the proviso which deals with causes not known to the carrier at the time the employe left the terminal. It is manifest that a provision relating to the leaving of a terminal can have no relation to the service of telegraph operators and train dispatchers, yet this proviso applies to those operatives as well as to trainmen.

> United States v. Missouri Pac. (C. C. A., 8th Circuit), 213 Fed. 169.

Also, in Baltimore & Ohio v. Int. Com. Com., 221 U. S. 612, the court said, with reference to telegraph operators:

> "Nor does the contention gather strength from the broad scope of the proviso in section 3, for if the latter, *in limiting the effect of the entire act,* could be said to include everything that may be

> embraced within the term merchandise as used in section 2, this would be merely a duplication and would not invalidate the act."

It is manifest, therefore, that the first part of the proviso must be read just as if the proviso ended with the words "act of God," and the present case, growing out of the breaking of an axle, is manifestly a case of casualty and, indeed, is stipulated and found to have been a casualty and an unavoidable accident [Tr. p. 24, par. 12]. Therefore, the provisions of the act cannot apply to the tour of duty in question.

For the reason, therefore, that the word "terminal" was used by Congress in the sense which it had come to have among railroad men in the United States; and for the reason that the Interstate Commerce Commission, almost immediately after the taking effect of this act, construed the proviso in question in accordance with the contention of the plaintiff in error, and so reported to the Congress of the United States, and for the reason that the delay was due to a casualty and unavoidable accident, removing the case entirely from the purview of the statute, it is respectfully submitted that the judgment of the District Court ought to be reversed and the cause remanded, with directions to dismiss the complaint.

Dated September 16, 1914.

U. T. Clotfelter,
E. W. Camp,
Paul Burks,
Attorneys for Plaintiff in Error.